

EMPLOYER STATUS DETERMINATION

Escanaba Services, Inc.

Decision on Reconsideration

This is the determination of the Railroad Retirement Board on reconsideration of the status of Escanaba Services, Inc. (ESI) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). In a decision issued on August 8, 1994, a majority of the Board, Mr. Kever dissenting, found that ESI was under common control with a rail carrier employer and provides service in connection with railroad transportation. Accordingly, a majority of the Board held ESI to be a covered employer under the Acts from October 16, 1984.

In a letter dated July 27, 1995, ESI requested reconsideration of the Board's determination, arguing that it is not under common control with a rail carrier employer and therefore is not a covered employer under the Acts. In its request for reconsideration, ESI stated that the Escanaba & Lake Superior Railroad Company (BA No. 2606) (E&LS) is a corporation owned by John C. Larkin, Wade W. Larkin, and Avis K. Larkin and controlled by a Voting Trust Agreement dated December 15, 1983. The Voting Trust Agreement provides that control of the E&LS is apportioned as follows:

Wade W. Larkin	49%
John C. Larkin	49%
Avis K. Larkin	2%

The Agreement provides that it will last for 20 years or until Wade W. Larkin's death or until John Larkin acquires all shares of stock from Wade Larkin, whichever occurs first. The Agreement prohibits the assignment of shares to anyone other than Wade, Avis, or John Larkin, except upon the death of a shareholder or with the written agreement of Wade, John, and Avis Larkin. The Agreement further provides that no assignment of shares shall alter the voting percentage set out in the Agreement (and at the beginning of this determination).

Information previously furnished by ESI indicates that these same three individuals serve as the officers and the only directors of ESI. ESI's Articles of Incorporation, dated October 12, 1984, list the three as the original Board of Directors and sets out the same street address for both Wade Larkin and Avis Larkin (1132 Birkdale Court, Naperville, Illinois). A letter dated

February 16, 1994, responding to the agency's inquiry about ESI, lists that same address as the address of the corporation and states that the same three individuals continue to serve as ESI's directors. Wade W. Larkin is ESI's Chairman of the Board, John C. Larkin is its President, and Avis K. Larkin is Secretary/Treasurer. Wade W. Larkin is also ESI's Chief Executive Officer.

The Pocket List of Railroad Officials for the Third Quarter of 1995 states (on page C-73) that Wade, John, and Avis Larkin hold the same positions as officers of E&LS (i.e., Chairman, President, and Secretary/Treasurer, respectively) that they hold in ESI.

ESI argues in its request for reconsideration that it is not under common control with E&LS, pointing out that Wade W. Larkin owns 100% of ESI and controls 49% of E&LS by reason of the Voting Trust Agreement. The other owners of E&LS, John C. Larkin and Avis K. Larkin, own no shares of ESI. ESI does not challenge the Board's finding that it provides service in connection with railroad transportation.

Section 1 of the RRA defines the term "employer" to include:

(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (45 U.S.C. §231(a)(1)(i) and (ii)).

Section 1 of the RUIA contains essentially the same definition.

The Board has defined "common control" in its regulations as follows:

A company or person is under common control with a carrier, whenever the control (as the term is used in §202.4) of such company or person is in the same

person, persons, or company as that by which such carrier is controlled. [20 CFR 202.5].

Section 202.4 of the Board's regulations defines the term "control" to mean:

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person. [20 CFR 202.4.]

ESI argues in its request for reconsideration that it is not under common control with E&LS because one person, Wade W. Larkin, owns 100% of ESI, but only controls 49% of E&LS and because the other two owners of E&LS own no shares of ESI. This argument ignores the fact that the control of both companies is held by a small group of three people who apparently are members of the same family. In fact, two of those individuals have the same address, which is also the corporate address of ESI. More important, the same three individuals serve as the officers of both companies and serve as directors of ESI. Section 202.4 expressly states that control is not determined by stock ownership, but rather by the existence of the right or power "by any means, method or circumstance" to direct the policies and business of the company. The evidence in this case clearly demonstrates that a small group of three people together own and control both ESI and the Escanaba & Lake Superior Railroad Company. The decision in Union Pacific Corporation v. United States, 5 F.2d 523 (Fed. Cir. 1993), cited by ESI in its request for reconsideration, involved the employer status of a holding company and does not apply to this case.

A majority of the Board therefore finds that ESI is under common control with the Escanaba & Lake Superior Railroad Company. Since ESI did not challenge the Board's finding in B.C.D. 94-67 that it provides service in connection with railroad transportation, the Board finds that ESI falls within the definition of "employer" set out in section 1(a)(1)(ii) of the RRA and section 1(a) of the RUIA effective October 16, 1984, the date on which it was incorporated. The decision in B.C.D. 94-67 is affirmed.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting)

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C. 1792-95

TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination -- Decision on Reconsideration
Escanaba Services, Inc.

Attached is a proposed decision on reconsideration for Board approval.

Attachment

